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FILED
YOLO SUPERIOR COURT

APR 26 2010
By 
Deputy

YOLO COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

Case no. CR08-3355

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff,

vs.

MARCO ANTONIO TOPETE,

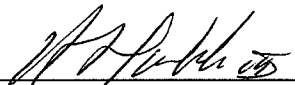
Defendant(s).

**APPLICATION TO SEAL
DECLARATION OF CRAIG WILLIAM
HANEY IN SUPPORT OF MOTION
FOR CONTINUANCE OF TRIAL;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
HAYES H. GABLE, III**

TO THE HONORABLE JUDGE PAUL K. RICHARDSON, JUDGE PRESIDING IN
DEPARTMENT SIX OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND
FOR THE COUNTY OF YOLO:

DEFENDANT hereby moves to seal the declaration which is conditionally filed under seal
herewith. This application is based on the attached memorandum of points and authorities and
declaration of counsel.

Dated: April 23, 2010


HAYES H. GABLE, III
Attorney for Defendant
MARCO ANTONIO TOPETE

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **THIS COURT HAS AUTHORITY TO SEAL ITS RECORDS AT**
4 **THE REQUEST OF A CRIMINAL DEFENDANT**

5 “[A] trial court has inherent discretion to allow documents to be filed under seal in
6 order to protect against revelation of privileged information.” (*People v. Garcia* (2007) 42
7 Cal.4th 63, 71-72, citing *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 383, fn. 21.)
8 California Rules of Court, rule 2.551, provides the procedures required for sealing court records:

9 **Rule 2.551. Procedures for filing records under seal**

10 **(a) Court approval required** A record must not be filed under seal without a court order. The court
11 must not permit a record to be filed under seal based solely on the agreement or stipulation of the
12 parties.

13 **(b) Motion or application to seal a record**

14 **(1) Motion or application required** A party requesting that a record be filed under seal must file a
15 motion or an application for an order sealing the record. The motion or application must be
16 accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing.

17 **(2) Service of motion or application** A copy of the motion or application must be served on all
18 parties that have appeared in the case. Unless the court orders otherwise, any party that already
19 possesses copies of the records to be placed under seal must be served with a complete, unredacted
20 version of all papers as well as a redacted version.

21 **(3) Procedure for party not intending to file motion or application**

22 **(A)** A party that files or intends to file with the court, for the purposes of adjudication or to use at
23 trial, records produced in discovery that are subject to a confidentiality agreement or protective order,
24 and does not intend to request to have the records sealed, must:

25 **(i)** Lodge the unredacted records subject to the confidentiality agreement or protective order and any
26 pleadings, memorandums, declarations, and other documents that disclose the contents of the
27 records, in the manner stated in (d);

28 **(ii)** File copies of the documents in (i) that are redacted so that they do not disclose the contents of
the records that are subject to the confidentiality agreement or protective order; and

(iii) Give written notice to the party that produced the records that the records and the other
documents lodged under (i) will be placed in the public court file unless that party files a timely
motion or application to seal the records under this rule.

1 (B) If the party that produced the documents and was served with the notice under (A)(iii) fails to file
2 a motion or an application to seal the records within 10 days or to obtain a court order extending the
3 time to file such a motion or an application, the clerk must promptly remove all the documents in
4 (A)(i) from the envelope or container where they are located and place them in the public file. If the
5 party files a motion or an application to seal within 10 days or such later time as the court has
6 ordered, these documents are to remain conditionally under seal until the court rules on the motion or
7 application and thereafter are to be filed as ordered by the court.

8 (4) **Lodging of record pending determination of motion or application** The party requesting that
9 a record be filed under seal must lodge it with the court under (d) when the motion or application is
10 made, unless good cause exists for not lodging it or the record has previously been lodged under
11 (3)(A)(i). Pending the determination of the motion or application, the lodged record will be
12 conditionally under seal.

13 (5) **Redacted and unredacted versions** If necessary to prevent disclosure, any motion or
14 application, any opposition, and any supporting documents must be filed in a public redacted version
15 and lodged in a complete version conditionally under seal.

16 (6) **Return of lodged record** If the court denies the motion or application to seal, the clerk must
17 return the lodged record to the submitting party and must not place it in the case file unless that party
18 notifies the clerk in writing within 10 days after the order denying the motion or application that the
19 record is to be filed.

20 (c) **References to nonpublic material in public records** A record filed publicly in the court must
21 not disclose material contained in a record that is sealed, conditionally under seal, or subject to a
22 pending motion or an application to seal.

23 (d) **Procedure for lodging of records**

24 (1) A record that may be filed under seal must be put in an envelope or other appropriate container,
25 sealed in the envelope or container, and lodged with the court.

26 (2) The envelope or container lodged with the court must be labeled "CONDITIONALLY UNDER
27 SEAL."

28 (3) The party submitting the lodged record must affix to the envelope or container a cover sheet that:

(A) Contains all the information required on a caption page under rule 2.111; and

(B) States that the enclosed record is subject to a motion or an application to file the record under seal.

(4) On receipt of a record lodged under this rule, the clerk must endorse the affixed cover sheet with
the date of its receipt and must retain but not file the record unless the court orders it filed.

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1 **(e) Order**

2 **(1)** If the court grants an order sealing a record, the clerk must substitute on the envelope or container
3 for the label required by (d)(2) a label prominently stating "SEALED BY ORDER OF THE COURT
4 ON (DATE)," and must replace the cover sheet required by (d)(3) with a filed-endorsed copy of the
5 court's order.

6 **(2)** The order must state whether--in addition to records in the envelope or container--the order itself,
7 the register of actions, any other court records, or any other records relating to the case are to be sealed.

8 **(3)** The order must state whether any person other than the court is authorized to inspect the sealed reco

9 **(4)** Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents
10 of any materials that have been sealed in any subsequently filed records or papers.

11 **(f) Custody of sealed records** Sealed records must be securely filed and kept separate from the
12 public file in the case.

13 **II.**

14 **THIS COURT SHOULD SEAL THE DECLARATION OF**
15 **CRAIG WILLIAM HANEY BECAUSE**
16 **IT CONTAINS PRIVILEGED INFORMATION**

17 In *Garcia v. Superior Court, supra*., the California Supreme Court held that a *Pitchess*
18 motion to discover law enforcement personnel records may be filed under seal to protect privileged
19 information. In so holding, the court looked at the question of protecting the defense's rights to
20 prevent disclosure generally. The court stated that "a ruling on a request to file under seal involves
21 balancing an accused's interest in protecting privileged information against opposing counsel's right
22 to effectively challenge the []motion. In ruling on a request to file under seal, a trial court must
23 carefully weight these competing concerns. (42 Cal.4th at p. 72.)

24 The court further stated that the accused's interest in protecting information that goes to
25 defense strategies and other trial preparations is such that rather than disclosing the information to
26 the prosecution, the defense may present it to the judge alone *in camera*.


27 [T]he defense is not required, on pain of revealing its possible strategies and work
28

1 product, to provide the prosecution with notice of its theories of relevancy of the
2 materials sought, but instead may make an offer of proof at an *in camera* hearing.
3 (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1320-1321.) . . . [A]
4 trial likewise encompasses the assistance of, and confidential communication with,
5 experts in preparing a defense. [Citations.] . . . the right logically extends to the
6 opportunity to investigate and develop evidence generally.
7 (*Id.* at pp. 73-74.)

8 In this case, the defense is seeking by noticed motion, a continuance of the trial date. In
9 support of that motion, Craig William Haney, Ph.D., J.D., a defense expert, has executed a
10 declaration that details the reasons in support of his representation that he cannot be prepared to
11 testify in this case for at least six months. In so doing, Dr. Haney sets forth defense strategies,
12 information obtained from the defendant, information on potential witnesses and other experts, in
13 addition to other work product. Clearly, this type of information is privileged and not subject to
14 disclosure to the prosecution. Accordingly, defendant requests that this application to seal the
15 declaration be granted.

16 Dated: April 23, 2010

Respectfully submitted,

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18 
19 HAYES H. GABLE, III
20 Attorney for Defendant
21 MARCO ANTONIO TOPETE

22 **DECLARATION OF HAYES H. GABLE, III**
23 **IN SUPPORT OF MOTION TO SEAL**

24 I, HAYES H. GABLE, III, declare:


- 25 1. I am one of the attorneys of record for the defendant, MARCO ANTONIO TOPETE, in
26 the above-captioned matter.
27
28 2. This declaration is made in support of the motion to seal the declaration of Craig William

1 Haney , a defense expert herein.

2 3. Said declaration of Craig William Haney sets forth defense strategies, information
3 obtained from the defendant, information on potential witnesses and other experts, in addition to
4 other work product.
5

6 4. Said information is privileged and may not be disclosed to the prosecution.

7 Executed under penalty of perjury on April 23, 2010, at Sacramento, California.
8

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HAYES H. GABLE, III

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Yolo. I am over the age of eighteen years and not a party to the above-entitled action; my business address is 430 Third Street, Woodland, CA 95695

On the date below, I served the following document(s):

**APPLICATION TO SEAL DECLARATION OF CRAIG
WILLIAM HANEY IN SUPPORT OF MOTION FOR
CONTINUANCE OF TRIAL; MEMORANDUM OF POINTS
AND AUTHORITIES; DECLARATION OF HAYES H.
GABLE, III**

☐ BY MAIL. I caused such envelope, with postage thereon fully prepaid, to be placed in the United States Mail at Sacramento, California addressed as follows:

☒ BY PERSONAL SERVICE. I caused such document(s) to be delivered by hand to the offices of the person(s) listed below:


JEFF REISIG
GARRET HAMILTON
Yolo County District Attorney
301 Second Street
Woodland, CA 95695

☐ BY FACSIMILE SERVICE. I caused the document(s) to be served via facsimile to the person(s) listed below:

☐ BY EMAIL ATTACHMENT. I caused the document(s) to be served via email as an attachment to the person(s) listed below:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 26, 2010, at Woodland, California.



THOMAS A. PURTELL